NO. 83-820

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA,

Petitioner,

v.

SADIE D. MORGADO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT

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QUESTION PRESENTED

1. Is this case ripe for review, when the Court of Appeals remanded a fee award proceeding to the district court for reconsideration?

2. Did the Court of Appeals properly remand a fee award proceeding to the district court for reconsideration under correct legal standards?

PARTIES

This petition for certiorari concerns only the appellate court's decision regarding attorney fees. Because the fee was totally contingent, the original plaintiff, Sadie D. Morgado, no longer has any interest in the outcome of the case. Susan Williams Reeves, the original plaintiff's attorney is the only person who has an interest in the outcome. The individual defendants and the City of Birmingham and the Birmingham-Jefferson County Civil Defense Corps do not seek any further relief in this court. The only petitioner is the Jefferson County Personnel Board.

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STATEMENT OF THE CASE

The respondent, Sadie D. Morgado, filed this individual action employment discrimination suit in 1974 in Birmingham, Alabama. Discovery was complete by mid-1976. The district court did not hold a pre-trial conference until January 12, 1981; trial began on January 28, 1981. The petitioners were found to have violated both the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972.

The trial judge found that the petitioner, Jefferson County Personnel Board, had written and enforced the sex-based qualifications for every staff position in the Birmingham-Jefferson County Civil Defense Corps (the agency). The only job open to a female in the agency was the one to which the respondent was originally assigned — Women's Activity Officer. The Jefferson County Personnel Board also established and maintained the illegal pay rates for the respondent's job until she became Acting Director of the agency. However, the respondent's pay stayed the same for six months while she served as Acting Director.

The respondent conduct discovery in 1975-76 on the promotion issue when she was excluded from consideration for the director's position. She was unsuccessful in enjoining the selection of a man recruited for the position from outside the agency. Shortly after the respondent's preliminary injunction motion and early on in the lawsuit, the defendants selected the respondent as Acting Director and then as Director where she still serves. At trial in January 1981 there were two issues: unlawful pay prior to respondent's promotion to Director, and secondly unlawful pay for six months after promotion when she was paid at pre-promotion pay rates. The trial court found discrimination on the former issue and no discrimination on the latter. The ap-

pellate court upheld the trial judge's findings that the equal pay/Title VII violation did not continue for the six-month period of time after the respondent became Acting Director of the civil defense program.

At the conclusion of trial, but before oral argument, the trial judge commented. "It's a very complex case, frankly, both factually and legally, but I'm not sure I can give you much guidance on the areas to touch on" at oral argument (Trial Tr. 483-484). The petitioner agreed on the complexity (Trial Tr. 484). Three weeks later at the attorney's fee hearing, the trial judge found the case to be "run of the mill" and "common-place"; he remarked a dozen times on the simplicity of the case finding it to be "among the most simple of all the employment discrimination cases I have come across". At the attorney's fee hearing he eliminated one-third of the trial-preparation and trial time hours without specifying any particular hours to be eliminated. He found that the remaining hours should be compensated at the hourly rate applicable to the year in which the service was performed even though by 1981 eight years had passed since the filing of the suit.

Evidence on the appropriate hourly rate came from both the petitioner's and respondent's counsel. At the hearing, the respondent's lawyer testified that her current, non-contingent monthly billing rate was $75 per hour for time spent out of court and $100 per hour for time in court (Feb 1981 Tr. p.82). The law firm representing the petitioner charged the petitioner from 1975 to 1981 at the rate of $50 per hour. The petitioner's lawyer testified that in 1975 and 1976, for a one-time case handled on a non-contingent basis, his firm might charge $60 per hour. The only evidence on the economic evaluation of contingent fee cases was given by Jim Harris, a Birmingham lawyer, who said that to justify the risk of a case taken on a wholly contin-

gent basis, he would expect to recover two to three times his normal non-contingent rate. He also testified that his law firm turned down the opportunity to handle civil rights cases because they did not feel that ultimately the firm would be awarded sufficient compensation for handling that type of case. The court awarded the respondent's lawyer whose fee was totally contingent, $50 per hour for hours through 1976 saying that rate also included a factor for contingency. The trial judge awarded $65 per hour to respondent's lawyer for 1980-81 time saying that rate also included an increase for the risk of contingency. The fees and expense requested totaled $23,260.36 and the trial judge using historical rates and reducing time awarded $8,183.67 in fees and costs.

REASONS FOR DENYING THE WRIT

I. The case is not ripe for review.

Although the petitioner appealed on the matter of attorney fees, there has been no final decision even in the trial court on the matter. The Court of Appeals remanded this case for reconsideration under correct principles of law. Once the district court has acted on the fee question, the petitioners have their remedy in the appellate process. *Brotherhood of Locomotive Firemen v. Bangor Aroostook R.R.*, 389 US 327, 328 ("because the Court of Appeals remanded this case, it is not yet ripe for review by this Court"). When a final recomputation is made, the petitioner will have an opportunity to seek review of the fee actually ordered to be paid.

II. The Court of Appeals applied the correct legal standard in requiring the District Court, on remand, to recalculate time spent on interrelated but unsuccessful issues.

The petitioner argues that *Hensley v. Eckerhart,* 103 S.Ct. 1933 (1983) was not followed by the Court of Appeals when that Court reversed the district court's exclusion of compensable hours. The Court of Appeals correctly followed *Hensley* which held that:

> Nor is it necessarily significant that a prevailing plaintiff did not receive all of the relief requested. For example, a plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified the expenditure of time. (*Hensley v. Eckerhart,* fn 11)

The Court of Appeals recognized that the district court failed to follow that standard but simply determined a winning-losing ratio. *Hensley* holds that "[S]uch a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors" *Hensley, supra* n. 11. The Court of Appeals found error as a matter of law, when the district court simply divided the case into winning and losing issues and refused compensation for unsuccessful time. *Jones v. Diamond,* 636 F.2d 1364 (5th Cir. 1981) (en banc).

The district court's simple labeling of the pre-promotion equal pay prevailing issue as unrelated to the post-promotion equal pay issue cannot catapult a mistake of law beyond the review of the appellate court. The appellate court recognized that claims of illegal and unequal pay rates before a promotion are related to the very same pay rate maintained after a promotion. The district court eliminated one-third of the 1981 trial and trial preparation time be-

cause he viewed that time as related "to the failure of Ms. Morgado to be appointed director, or the delay in appointing her to that position, or the pay differential during the approximate six months she held the title of acting director". But the respondent did not lose on the "failure of Ms. Morgado to be appointed director . . ." because Ms. Morgado had been director for almost six years prior to trial. Whether Ms. Morgado should be promoted to Director was not an issue capable of being lost in 1981. The issues presented and won were salary differentials due to sex. It was therefore error for the trial judge to eliminate one third of the trial preparation and trial time in 1981 for failure to prevail in having the respondent promoted to Director.

The Court of Appeals did not pre-empt the fact-finding discretion of the judge. There simply was no legal basis for his determination that development and presentation of evidence on successful Title VII equal pay issues are unrelated to contemporaneous unsuccessful efforts to show a continuation of the illegal conduct when the respondent performed as director but without the director's greater pay. Indeed, the interrelationship of those claims was purely a matter of law which did not require the appellate court to reverse the factual findings below.

III. The Court of Appeals' decision regarding delay in payment of fees is consistent with other circuits.

The trial judge failed to consider or account for an eight-year delay or for inflation during that time when he decided on the applicable hourly rates. Delay in payment of fees over such a long period even continuing through 1983 so dilutes the award that an otherwise reasonable fee may be converted into an unreasonably low one. While there is no set method for correcting for delay in payment, some

form of correction must be undertaken. *Johnson v. UAB*, 706 F.2d 1205 (11th Cir. 1983), *cert. denied*, No. 83-554 (November 28, 1983).

The petitioners claim that this holding is inconsistent with decisions of the Sixth and District of Columbia Circuits. While those Circuits have held that adjustments for delay or inflation are discretionary, the Eleventh Circuit has recognized that a delay in payment works a significant disadvantage to attorneys working on a contingent basis. To be paid in 1981 on the basis of earlier years' rates with no adjustment for the delay in payment discourages attorneys from undertaking complex litigation. In the antitrust field, courts have recognized this fact and have awarded fees adjusted for delay in payment. See, *In re Ampicillin Antitrust Litigation*, 81 FRD 395, 402 (D DC 1978); *In re Folding Carton Antitrust Litigation*, 84 FRD 245, 267 (ND Ill 1979); *Aamco Automatic Transmissions, Inc. v. Taylor*, 82 FRD 405 (ED Pa 1979); *Knutson v. Daily Review, Inc.*, 479 F Supp 1263 (ND Cal 1979).[1]

Because of this delay and the contingent nature of this type of case, attorneys who undertake civil rights cases are taking both a significant risk and a cut in short-term income. This risk is a proper factor to weigh in setting adequate compensation for the attorney who succeeds. Failure to do so contravenes the Congressional purpose of attracting the bar to serve as private attorneys general in civil rights cases. *Newmann v. Piggie Park*, 390 U.S. 400 (1968).

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[1]In 1981 the median time between filing and final disposition after trial of civil cases was 20 months; only ten percent of those civil cases took longer than 48 months. Administrative Office of the United States Courts, *1981 Annual Report of the Director*. Sixteen percent of the cases over three years old in 30 June 1981 were civil rights cases, while only 8.2% of the new filings during those three years were under civil rights acts. Thus, it appears that civil rights cases are less likely than the average to be completed quickly.

CONCLUSION

For the reasons set out in this brief, the writ of certiorari should be denied.

Submitted by,

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